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No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SCHOOL COMMITTEE OF THE
TOWN OF BURLINGTON, et al.,
Petitioners,
v.
DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS, et al.,

Respondents

On Writ Of Certiorari To
The United States Court Of
Appeals For The First Circuit

BRIEF FOR THE RESPONDENT Department Of Education Of The Commonwealth Of Massachusetts

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122

QUESTIONS PRESENTED

1. May the District Court, under the Education of the Handicapped Act, order a local education agency to reimburse the parents of a handicapped child for private school tuition and related expenses incurred by the parents for an appropriate placement while administrative and judicial review proceedings were pending?

2. Where parents have rejected a proposed Individualized Education Program, claimed an administrative appeal, and then enrolled their handicapped child in a private school, does § 615(e)(3) of the Education of the Handicapped Act operate as an absolute bar to tuition reimbursement, if the State and the District Court later determine that the private school was the appropriate educational placement?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 3

STATEMENT 4

SUMMARY OF ARGUMENT 35

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED, BASED UPON THE LANGUAGE, HISTORY, AND PURPOSES OF THE EHA, THAT THE DISTRICT COURT HAS THE DISCRETION TO AWARD TUITION REIMBURSEMENT TO THE PARENTS AT THE CONCLUSION OF THE JUDICIAL PROCEEDINGS. 42

A. An Award Of Tuition Reimbursement Comes Within The District Court's Authority To Grant Appropriate Relief. 42

B. The Guidelines Articulated By The Court Of Appeals For Determining Whether Reimbursement Is Appropriate Are Consistent With The EHA As Properly Construed. 63

II. THE PARENTS' ENROLLMENT OF THEIR HANDICAPPED CHILD IN AN APPROPRIATE PRIVATE SCHOOL, PENDING ADMINISTRATIVE AND JUDICIAL REVIEW, DOES NOT OPERATE AS A BAR TO REIMBURSEMENT UNDER § 1415(e)(2). 71

A. By Placing Their Child In Private School Pending Appeal, The Parents Did Not Violate The Provisions Of 20 U.S.C. § 1415(e)(3). 72

B. Section 1415(e)(3) Does Not Govern The Availability Of Reimbursement. 80

CONCLUSION 95

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	67
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	45, 46
Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480, 381 N.E.2d 922 (1978)	61, 69
Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981)	43, 45
Blomstrom v. Massachusetts Department of Education, 532 F. Supp. 707 (D. Mass. 1982)	60
Board of Education v. Rowley, 458 U.S. 176 (1982)	passim
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	54
Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1984)	59
Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1980)	86
Department of Education v. Katherine D., 727 F.2d 809 (9th Cir. 1983)	45

Doe v. Anrig,
692 F.2d 800 (1st Cir. 1982) 32

Doe v. Anrig,
728 F.2d 30 (1st Cir. 1983) 32, 59

Doe v. Anrig,
561 F. Supp. 121
(D. Mass. 1983) 2, 59

Doe v. Brookline School Committee,
722 F.2d 910 32, 58, 59,
(1st Cir. 1983) 62, 80, 88

Ezratty v. Puerto Rico,
648 F.2d 770 (1st Cir. 1981) 70

Hall v. Cole,
412 U.S. 1 (1973) 46, 48

Hurry v. Jones,
734 F.2d 879 (1st Cir. 1984) 32

Irving Independent School District
v. Tatro,
104 S. Ct. 3371 (1984) 53, 57

Lake Country Estates, Inc. v.
Tahoe Regional Planning Agency,
400 U.S. 391 (1979) 48

Marvin H. v. Austin Independent
School District,
714 F.2d 1348 (5th Cir. 1983) 43

Max M. v. Thompson,
585 F. Supp. 317 (N.D. Ill. 1984) 70

Miener v. State of Missouri,
673 F.2d 969 (8th Cir.),
cert. denied, 459 U.S. 909
(1982) 43

Mills v. Board of Education
348 F. Supp. 866
(D.D.C. 1972) 83, 84

Monahan v. Nebraska,
491 F. Supp. 1074 (D. Neb. 1980),
aff'd in part, vacated in part,
645 F.2d 592 (8th Cir. 1981) 74

Mt. Healthy City School District
Board of Education v. Doyle,
429 U.S. 274 (1977) 48

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 49

Pennhurst State School & Hospital
v. Halderman,
104 S. Ct. 900 (1984) 70

Pennsylvania Association for
Retarded Children v.
Pennsylvania,
343 F. Supp. 279
(E.D. Pa. 1972) 83, 84

Philbrook v. Glodgett,
421 U.S. 707 (1975) 54

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 48

Powell v. Defore,
699 F.2d 1078 (11th Cir. 1983) 45

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 76

Scokin v. State of Texas,
723 F.2d 432 (5th Cir. 1984) 45

Smith v. Robinson,
104 S. Ct. 3457 (1984) 45, 46, 57, 59, 62, 70

St. Louis Developmental Disabilities Treatment Center Parents Association v. Mallory,
591 F. Supp. 1416 (W.D. Mo. 1984) 70

Stacey G. v. Pasadena Independent School District,
695 F.2d 949 (5th Cir. 1983) 90

Stemple v. Board of Education,
623 F.2d 893 (4th Cir. 1980),
cert. denied, 450 U.S. 911 (1981) 92

Students of California School for the Blind v. Honig,
745 F.2d 582 (9th Cir. 1984),
petition for cert. filed,
53 U.S.L.W. 3243
(U.S. Sept. 17, 1984)
(No. 84-436) 70

Tilton v. Jefferson County Board of Education,
705 F.2d 800 (6th Cir. 1983),
cert. denied, 104 S. Ct. 998
(1984) 80

Tokarcik v. Forest Hills School District,
655 F.2d 443 (3rd Cir.),
cert. denied, 458 U.S. 1121
(1982) 85

Town of Burlington v. Department Education,
655 F.2d 428 (1st Cir. 1981) 2, 32

Udall v. Tallman,
380 U.S. 1 (1965) 85

United States v. Larionoff,
431 U.S. 864 (1977) 85

William S. v. Gill,
591 F. Supp. 422 (N.D. Ill. 1984) 70

Zvi D. v. Ambach,
694 F.2d 904 (2nd Cir. 1982) 74

Constitutional Provision

United States Constitution
Eleventh Amendment 48, 57, 70

Statutes

20 U.S.C. § 1254(1) 3

20 U.S.C. § 1400(b)(8) 57

20 U.S.C. § 1400(b)(9) 57

20 U.S.C. § 1400(c) 55

20 U.S.C. § 1401(1) 10

20 U.S.C. § 1401(15) 10, 11

20 U.S.C. § 1401(16) 10, 55

20 U.S.C. § 1401(18) 5, 55

20 U.S.C. § 1401(19) 6

20 U.S.C. § 1411(c) 57

20 U.S.C. § 1412(1) 5

20 U.S.C. § 1412(6) 6

20 U.S.C. § 1413(a)(4)(b) 55

20 U.S.C. § 1415(b)(1)(A) 7

20 U.S.C. § 1415(b)(1)(C) 7

20 U.S.C. § 1415(b)(1)(E) 7

20 U.S.C. § 1415(b)(2) 8

20 U.S.C. § 1415(d) 8

20 U.S.C. § 1415(e) 35, 50, 52

20 U.S.C. § 1415(e)(2) passim

20 U.S.C. § 1415(e)(3) passim

42 U.S.C. § 1983 26

Pub. L. No. 93-380, § 612 50

Pub. L. No. 94-142 3

88 Stat. 484 (1974) 50

89 Stat. 773 (1975) 3

Mass. Gen. Laws Ann., ch. 71B (West 1982) 21, 61

Mass. Gen. Laws Ann., ch. 71B, § 5 (West 1982) 58

Mass. Gen. Laws Ann., ch. 30A, § 14(3)(West 1979) 22

Mass. Gen. Laws Ann., ch. 30A, § 14(7)(e)(West 1979) 24

Regulations

34 C.F.R. Part 300 3

34 C.F.R. § 300.342 79

34 C.F.R. §§ 300.400-300.452 55

34 C.F.R. § 300.401(a)(2) 55

34 C.F.R. § 300.403 53

34 C.F.R. Part 300, Appendix C, Notice of Interpretation 79, 85

603 C.M.R. 28, ¶ 202 58

603 C.M.R. 28, ¶ 400 18

603 C.M.R. 28, ¶ 401.1 18

603 C.M.R. 28, ¶ 401.2 18

603 C.M.R. 28, ¶ 410.0 22

603 C.M.R. 28, ¶ 502.1 14

603 C.M.R. 28, ¶ 502.2 14

603 C.M.R. 28, ¶ 502.3 14

603 C.M.R. 28, ¶ 502.4 14, 17

603 C.M.R. 28, ¶ 502.5 14

603 C.M.R. 28, ¶ 502.6 14

603 C.M.R. 28, ¶ 502.7 14

603 C.M.R. 28, ¶ 504.5 58

603 C.M.R. 28, ¶ 504.5(f) 69

Legislative History

121 Cong. Rec. 37,410 (1975) 90

121 Cong. Rec. 37,412 (1975) 87

121 Cong. Rec. 37,416 (1975) 87

S. Rep. No. 168, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1425 62

S. Conf. Rep. No. 455, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1480 50, 52, 82

Miscellaneous

Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies 29 U.C.L.A. L. Rev. (1981) 43, 48

Webster's Third New International Dictionary (1964) 47

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OPINIONS BELOW

1. The Opinion of the Court of Appeals for the First Circuit (Pet. App. 87a-143a)[1/] is reported at 736 F.2d 773.

1/ "Pet. App." denotes the appendix to the petition for writ of certiorari.

(footnote continued)

2. The March 7, 1983, Opinion of the District Court (Pet. App. 69a-86a) is reported at 561 F. Supp. 121.

3. The August 13, 1982, Memorandum of Decision of the District Court (Pet. App. 57a-68a) is unreported.

4. The Opinion of the Court of Appeals for the First Circuit (Pet. App. 36a-47a) is reported at 655 F.2d 428.

5. The November 19, 1980, Memorandum of Decision of the District Court (Pet. App. 28a-34a) is unreported.

6. The Decision of the Bureau of Special Education Appeals (Pet. App. 1a-27a) is unreported.

JURISDICTION

The judgment of the Court of Appeals

(footnote continued)
Each of the opinions below is set forth in full at the referenced pages of that appendix.

was entered on May 29, 1984. Pet. App. 144a. A motion for rehearing and rehearing en banc was denied on June 29, 1984. Pet. App. 146a-148a. On September 18, 1984, a petition for writ of certiorari was filed presenting six questions for review. The petition was granted on December 3, 1984, but limited to questions I and V. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), 20 U.S.C. §§ 1400 et seq., and the implementing regulations, 34 C.F.R. Part 300, are set forth in the appendix to this brief at 1a-10a.

STATEMENT

1. The Education of the Handicapped Act (EHA), enacted in 1975, presents "an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out." Board of Education v. Rowley, 458 U.S. 176, 179 (1982) (citations and quotations omitted). Ambitious as it is, the EHA and its implementing regulations are exceedingly complex and require full explication here. The EHA provides federal money to State

educational agencies which have in effect a policy that assures that all handicapped children receive a "free appropriate public education." 20 U.S.C. § 1412(1). "Free appropriate public education" consists of "special education and related services . . . provided at public expense," meeting "the standards of the State educational agency" at the appropriate pre-school, elementary or secondary level, and "provided in conformity with the individualized education program . . . ." 20 U.S.C. § 1401(18).

The "individualized education program" (IEP) is the written document setting forth for each handicapped child, the child's educational performance, instructional goals and objectives, and "specific educational services to be

provided to such child, and the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. § 1401(19). The IEP must be prepared at least annually, and is to be developed in a meeting among a representative of the local educational agency, the teacher, the parents, and, where appropriate, the child. Id.

The State educational agency must also provide assurance that educational programs for the handicapped administered by a local educational agency will comply with the requirements of the EHA, be under the general supervision of the State educational agency, and meet education standards of the State educational agency. 20 U.S.C. § 1412(6).

The cornerstone of the EHA is the extensive procedural safeguards available to the parents of a handicapped child. Parents must be given an opportunity to examine records relevant to the identification, evaluation, and placement of the handicapped child and to obtain an independent educational evaluation (20 U.S.C. § 1415(b)(1)(A)); must be given prior notice of any proposed change in the educational placement (20 U.S.C. § 1415(b)(1)(C)); and must have an opportunity to present a complaint to school authorities "with respect to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(1)(E). If the parties are not satisfied with the

response of school authorities, they are entitled to a "due process" hearing before an impartial hearing officer. 20 U.S.C. § 1415(b)(2).[2/]

At the administrative hearing, parents have the right to be accompanied by counsel, present evidence, and cross-examine witnesses. The hearing officer must make written findings and conclusions. 20 U.S.C. § 1415(d). Any party aggrieved by the findings of the state agency may seek judicial review in state or federal court. 20 U.S.C. § 1415(e)(2). In a proceeding for judicial review in federal court, the court shall give "due weight" to the decision

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2/ In Massachusetts, that hearing is conducted at the state level by the Department of Education's Bureau of Special Education Appeals. There is no local educational agency level hearing under Massachusetts procedures.

of the state administrative agency[3/] and "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Of significance here, "[d]uring the pendency of [the administrative and judicial proceedings], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." 20 U.S.C. § 1415(e)(3)

2. Michael Panico is the subject of the protracted administrative and judicial proceedings in this case. He is a child with above-average-to-superior intelligence but one who has a severe learning disability which interferes with

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3/ Rowley, 458 U.S. at 206.

his ability to read, write, spell, tell time, and differentiate between right and left or up and down.[4] The parties agree that Michael is handicapped within the meaning of the EHA[5] and, therefore, is entitled to special education. Pet. App. 15a.[6] The factual dispute centers around the origin and nature of his learning disability[7] and the appropriate educational placement to meet

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4/ See Joint Appendix (J.A.) 26, 334, 337-39.

5/ See 20 U.S.C. § 1401(1) and (15).

6/ The EHA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child . . . ." 20 U.S.C. § 1401(16).

7/ "[C]hildren with specific learning disabilities" are defined under the EHA as "children who have a disorder in one or more of the basic psychological processes involved in understanding or

(footnote continued)

his individual needs. The parties also disagree on who shall ultimately bear the costs of the private school expenses incurred during the administrative and judicial proceedings.[8/]

a. Michael attended the Memorial School, a public school in Burlington,

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(footnote continued)
in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 20 U.S.C. § 1401(15).

8/ The Court of Appeals has remanded the issues of appropriate placement and financial responsibility therefor for resolution at a new trial. Pet. App. 119a-20a. Thus, this case is actually before the Court as an interlocutory matter and this Court's opinion will not fully and finally resolve the dispute among the parties. For this reason, perhaps the writ should be dismissed as improvidently granted.

Massachusetts, from kindergarten through the third grade. As early as the first grade, the parents and the school disagreed about the source of Michael's learning problems. Burlington believed them to be primarily the result of emotional problems, whereas the parents suspected a neurologically-based learning disability. J.A. 38-39. At the end of first grade, the parents requested that the school perform a full special education evaluation. Id. Although an evaluation was conducted, Burlington concluded that Michael did not need special education and did not prepare an IEP. Michael proceeded to the regular second grade class with no specialized instruction.

During the second grade, Michael performed poorly in school, particularly in

reading. He also suffered from severe migraine headaches. His pediatrician referred him to a pediatric neurologist at the Massachusetts General Hospital for a complete neurological examination. Those tests showed Michael to be extremely bright but indicated clear evidence of a major learning disability. J.A. 41; Court of Appeals Appendix (C.A. App.) Vol. IV, 332. As a result of this testing, and at the parents' request, Burlington developed an IEP for Michael in March of his second grade year covering the remainder of the second grade and the third grade. The IEP, which the parents accepted, provided Michael with individual tutoring by a reading special-

ist for one hour each day, and individual and group counselling.[9/] J.A. 42; C.A. App. Vol. IV, 337-41.

At the beginning of the third grade, without informing the parents or obtaining their consent, Burlington halved Michael's individual reading tutorial from one hour to thirty minutes per day.

9/ Massachusetts' special education regulations, which are codified at 603 Code of Massachusetts Regulations (C.M.R.) 28.00 provide for a continuum of special education program prototypes which range from education in the regular classroom with modification (603 C.M.R. 28.00, ¶ 502.1), to programs with varying amounts of time away from the regular classroom (less than 25% - 603 C.M.R. 28.00, ¶ 502.2, up to 60% - 603 C.M.R. 28.00, ¶ 502.3), to substantially separate public school programs (603 C.M.R. 28.00, ¶ 502.4), private day school placements (603 C.M.R. 28.00, ¶ 502.5), private residential school placements (603 C.M.R. 28.00, ¶ 502.6), and hospital placements (603 C.M.R. 28.00, ¶ 502.7). Michael's IEP for the third grade provided for a program prototype 502.2 (less than 25% away from the regular class) placement.

J.A. 44; Pet. App. 20a. Throughout the third grade, Michael's reading skills regressed and he was showing little progress in school generally. J.A. 44; Pet. App. 125a.

In May and June of 1979, the parents met on several occasions with school officials to discuss an appropriate educational plan for the fourth grade. J.A. 44-46. Burlington and the parents agreed that Michael's continued special education placement at the Memorial School was not appropriate for his education needs. Pet. App. 13a. The parties still did not agree, however, on the source of Michael's learning difficulties; that is, whether they stemmed from emotional problems as the school officials believed, or whether they were neurologi-

cally-based as the parents believed. J.A. 45-46. The school agreed to have Dr. Lott, the pediatric neurologist from Massachusetts General Hospital who had previously tested Michael, coordinate the psychological testing necessary for the preparation of the IEP. J.A. 5. Nevertheless, when the IEP for Michael's fourth grade was prepared in the early summer of 1979, it was without the benefit of Dr. Lott's latest test results. J.A. 204, 330-31.

The focus of this IEP was on the development of Michael's reading skills. J.A. 7. It provided, however, for Michael's transfer from his current special education program at the Memorial School to a substantially separate special class at the Pine Glen School,

another public school in Burlington.[10/] J.A. 13. That class was taught by a Mr. McAleer and was comprised of six or seven students, four or five of whom were identified as having either behavioral or emotional problems. Pet. App. 7a. The separate class was sometimes referred to as the "primary adjustment class." Pet. App. 7a.

b. The parents rejected the fourth grade IEP on July 3, 1979, setting in motion the administrative appeal before the Massachusetts Department of Education's (Department) Bureau of Special Education Appeals (BSEA) which ultimately gave rise to the judicial proceedings.

10/ Under Massachusetts regulations this program was designated as a prototype 502.4 (substantially separate) program. 603 C.M.R. 28.00, ¶ 502.4.

J.A. 18, 25. On July 10, 1979, Dr. Lott informed the parents that Michael's tests showed a "severe learning disorder characterized by perceptual difficulties," and recommended a highly specialized setting for children with learning handicaps, such as the Carroll School, an approved private special education school in Lincoln, Massachusetts. J.A. 26.

During the summer, the parties attempted mediation before the BSEA in order to resolve the dispute over the fourth grade (1979-80) IEP.[11/] These

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11/ Paragraph 400.0 of the Massachusetts special education regulations provides for a mediation or conference conducted by the Department to encourage informal resolution of disputes over proposed special education programs. If informal resolution proves unsuccessful or the parents do not wish to participate in such mediation, the parents or the local educational agency may request a hearing before the BSEA. 603 C.M.R. 28.00, ¶¶ 400.0, 401.1, 401.2.

attempts proved unsuccessful and the parents requested a hearing before the BSEA. J.A. 27, 34. In September 1979, the parents enrolled Michael at the Carroll School.

c. Between September 1979, and November 1979, a lengthy administrative hearing was held before the BSEA to determine Michael's appropriate educational placement for the fourth grade, the 1979-80 school year.12/ On January 31, 1980, the BSEA issued a decision holding that Mr. McAleer's "primary adjustment" class was not the appropriate educational placement for the 1979-80 school year. The hearing officer found, inter alia, that the student composition of Mr.

12/ Hearings were held on September 26, October 30, 31, and November 1, 1979, producing a hearing transcript of over 575 pages and more than 125 exhibits. See C.A. App. Vols. III, IV.

McAleer's class, the reading and teaching methods used there, and the teacher's lack of specialized training in teaching children with learning disabilities like Michael's rendered Mr. McAleer's class inappropriate to meet Michael's special educational needs. Pet. App. 14a-15a. The hearing officer instead found that the Carroll School, which provided small-group instruction in a language-based program for children with learning disabilities with a focus on reading and related skills and individual tutoring in reading and spelling, was appropriate to Michael's special needs and was "the least restrictive adequate program within the record." Pet. App. 14a, 16a. The hearing officer's rejection of Burlington's proposed IEP was also based, in

part, on extensive substantive and procedural violations committed by Burlington. Pet. App. 13a, 17a-21a. Accordingly, the hearing officer ordered Burlington to pay for Michael's education at the Carroll School for the 1979-80 school year. Pet. App. 23a.

3. On February 26, 1980, Burlington filed a two-count complaint in the United States District Court under 20 U.S.C. § 1415(e)(2) and Mass. Gen. Laws Ann. ch. 71B (West 1982), St. 1972, c. 766, § 11, the parallel state statute, seeking judicial review of the state administrative decision. J.A. 175-78. Burlington named the parents and the Department as defendants.

a. The early months of the litigation involved a dispute over implementa-

tion of the BSEA order that Burlington pay for the tuition and related expenses at the Carroll School for the 1979-80 school year.[13/] On May 8, 1980, Burlington moved for a stay of the BSEA decision which was denied by the District Court on July 24, 1980. J.A. 1. By September 1980, Burlington still had not paid for the previous school year, nor did it plan to pay for the 1980-81 school year which was about to commence. Accordingly, the Department and the parents sought preliminary injunctions requiring Burlington to comply with the BSEA decision, as well as to pay for Michael's continued placement at the Carroll

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13/Under state law, the BSEA decision is to be implemented forthwith and a complaint for judicial review does not operate as a stay of the decision. See 603 C.M.R. 28.00, ¶ 410.0; Mass. Gen. Laws Ann. ch. 30A, § 14(3) (West 1979).

School. J.A. 1. On February 12, 1981, the District Court ordered Burlington, pending a final determination on the merits, to pay the Carroll School for the current school year (1980-81) as well as to reimburse the parents $8,837.97 for expenses incurred during the previous school year (1979-80). J.A. 187-188.

b. At the same time that the parties were litigating the interim funding issue, the case on the merits was proceeding under the state law claim raised in the complaint. On November 19, 1980, the District Court granted summary judgment for the parents and the Department.[14/] Pet. App. 28a-34a. Utilizing

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14/ Shortly thereafter, the Department informed Burlington that it would freeze all its special education funds unless it complied with the BSEA order. Pet. App. 40a.

the state law standard of judicial review,[15] the District Court agreed with the BSEA that the Carroll School, and not Mr. McAleer's special class, was the appropriate educational placement for Michael for the school year 1979-1980.

c. Burlington appealed from the summary judgment decision as well as the several interlocutory orders regarding the interim funding. The appeals were consolidated and resulted in the first Court of Appeals opinion in this case. Pet. App. 36a-56a.

The Court of Appeals vacated the District Court's decision on the state law

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15/ Under this standard, the court was required to uphold the BSEA decision if it was supported by "substantial evidence." See Mass. Gen. Laws Ann. ch. 30A, § 14(7)(e) (West 1979).

claim holding that the "preponderance of the evidence" standard of review required by the EHA preempts the more limited "substantial evidence" state standard of review. Pet. App. 42a-43a. On the interim funding issue, the Court of Appeals held that the funding of a private placement pending judicial review should be determined in accordance with traditional preliminary injunction standards. It further held that the District Court incorrectly based its interim funding decisions on § 1415(e)(3), ruling that the provision governs disputes over educational placements, rather than the funding of those placements. Pet. App. 46a-47a.

d. Since the Court of Appeals ruled that the EHA provided the sole mechanism for judicial review, the parties pre-

pared for trial under § 1415(e)(2). In a comprehensive pretrial order, the District Court limited the issues to be tried, dismissed a counterclaim by the parents for general damages under the EHA and 42 U.S.C. § 1983, and denied Burlington's motion for summary judgment. Pet. App. 48a-56a.[16/]

In May 1982, the District Court held a four-day trial under the federal count of Burlington's complaint. On August 13, 1982, the District Court set aside the BSEA decision and held that the appropriate placement for Michael for the 1979-80 school year was not at the Carroll School, but in the substantially separate class in the public school

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16/ Burlington argued that it was entitled to summary judgment on the basis of § 1415(e)(3), because the parents had enrolled Michael in the Carroll School while the administrative proceedings were pending.

proposed by Burlington. Pet. App. 66a-67a. The District Court also ruled that for the school years 1980-81 and 1981-82, the parents failed to meet their burden of showing that the public school placement would not have been appropriate.[17/] Burlington then sought to be reimbursed by the parents for monies it paid to the Carroll School for the school years 1980-81 and 1981-82, by filing a proposed form of judgment which included

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17/ No IEPs have been prepared for Michael since the judicial proceedings began in 1980. Although Burlington has claimed repeatedly that the parents improperly refused to make Michael available for evaluations during the course of the litigation, the parents have denied this and the District Court specifically refused to hear evidence on this issue. Pet. App. 55a-56a; J.A. 379. In any event, the Court of Appeals held that a local educational agency is required to prepare annual IEPs whether the child is made available for evaluation or not. Pet. App. 123a.

an award of reimbursement.[18]

d. The case next was transferred to Senior Circuit Judge Aldrich (sitting in the District Court by designation) to determine whether Burlington was entitled to retroactive reimbursement from the parents and whether the parents could recover from Burlington for the expenses they paid for the school year 1979-80.[19] Judge Aldrich held that Burlington could recover from the parents the money it had paid to the Carroll School for tuition and related expenses during the judicial proceedings. The

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18/ Burlington sought to recover from the parents a total of $12,844.66.

19/ Judge Aldrich was considering similar reimbursement issues in two other cases. Accordingly, the three cases were consolidated for the purpose of determining the reimbursement issues only. Pet. App. 70.

court also held that the parents could not recover from Burlington the money they had expended for the 1979-80 school year. Pet. App. 82a-85a.

Accordingly, on May 9, 1983, judgment was entered for Burlington, and the parents were ordered to repay Burlington $8,449.00.[20/] The District Court also ruled that Burlington was not responsible for the expenses the parents incurred for the 1979-80 school year. J.A. 407.

e. The Department and the parents appealed from the District Court's decision setting aside the BSEA decision. This appeal resulted in the second Court

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20/ This amount represents the tuition and related expenses paid by Burlington for the Carroll School for two years less the per-pupil amount Burlington received from the state for those years. J.A. 407.

of Appeals opinion which is now before this Court. Pet. App. 87a-143a. In a comprehensive opinion, the Court of Appeals addressed "a wide variety of novel issues under the Act. These include[d]: the choice of law to be utilized in the state due process hearings; the impact of a school system's regulatory violations on the validity of a child's IEP; the weight to be accorded to the state administrative record and the hearing officer's findings upon appeal; the meaning of the term 'additional evidence' as used in the Act; the appropriate burden of proof at trial for the years subsequent to the contested IEP[;] and the significance of a diagnostic determination by the trial judge." Pet. App. 88a.

The Court of Appeals concluded,

inter alia, that the District Court failed to give proper weight to the BSEA's findings with respect to Burlington's substantive and procedural violations. It, therefore, set aside the decision and remanded the case for a new trial in accordance with the guidelines set forth in the opinion. Pet. App. 139a.

The Court of Appeals also addressed the reimbursement issue that was certain to arise after a final decision on remand, wherein Burlington and the parents each sought to be reimbursed for monies spent on Michael's educational placement during the five year odyssey through the administrative and judicial review proceedings. The court's consideration of the availability of tuition reimbursement is the last in a line of First Circuit

decisions in which the reimbursement issue has arisen in varying factual and procedural contexts.[21]

After examining the language of the EHA, its legislative history, its goals, and decisions from other circuits, the Court of Appeals concluded that § 1415(e)(2), which empowers a district court to grant "appropriate relief," permits the district court, in its discretion, to order retroactive reimbursement to the party who prevails after judicial review. Pet. App. 131a-133a. Thus, on remand, if Burlington succeeds in showing that its proposed educational placement

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21/ See Town of Burlington v. Department of Education, 655 F.2d 428 (1st Cir. 1981); Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982) (Doe v. Anrig I); Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983); Doe v. Anrig, 728 F.2d 30 (1st Cir. 1984) (Doe v. Anrig II); Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984).

was appropriate under the EHA, it may seek to recover from the parents monies it expended during the appeal period. Conversely, if the District Court finds that the private, not public school, was the appropriate placement for Michael, the parents may be permitted to seek reimbursement from Burlington. The court stated, "whether to order reimbursement, and at what amount, is a question determined by balancing the equities." Pet. App. 137a. The opinion sets forth guidelines for determining the circumstances under which an award of reimbursement would be considered "appropriate relief" under the EHA. These include whether the parties have complied with state and federal regulations, have acted reasonably, and have acted in good faith.

Pet. App. 137a-38a.

The Court of Appeals further held that the parents' actions did not contravene § 1415(e)(3), the so-called "interim placement" provision, and, in any event, that section does not act as an automatic bar to the parents' right to seek reimbursement should they ultimately succeed in showing that the Carroll School was the appropriate placement. Pet. App. 132a.

Finally, the court concluded that since, in January 1980, the BSEA found the Carroll School to be the appropriate placement and ordered the child placed at the Carroll School for the 1979-80 school year, the parents should not be held responsible for the costs of the

Carroll School from January through June 1980. Pet. App. 135a-37a.

On September 18, 1984, Burlington filed a petition for a writ of certiorari seeking review of the entire case to date.

On December 3, 1984, this Court granted certiorari, but limited review to questions I and V, those questions addressing the availability of retroactive reimbursement to the parents.

SUMMARY OF ARGUMENT

Against this complex background, this case presents straight-forward questions of statutory interpretation of two provisions of 20 U.S.C. § 1415(e), that section of the EHA which sets forth the procedural safeguards available to the parents of a handicapped child.

I. The first question to be addressed is whether the district court may order a local educational agency to reimburse parents for private school tuition and related expenses they incurred during the pendency of the administrative and judicial proceedings. The language, history, and purpose of the EHA dictates an affirmative answer to this question. Section 1415(e)(2) authorizes a district court to "grant such relief as [it] determines is appropriate." The ordinary meaning of the word "appropriate" is "suitable", i.e., tailored to the facts and circumstances of each case. The term "appropriate relief" signifies a grant of equitable jurisdiction which includes the authority to order reimbursement. Since neither § 1415(e)(2) itself nor

any other provision of the EHA expressly precludes an award of tuition reimbursement, reimbursement may be awarded as "appropriate relief."

The EHA's legislative history demonstrates that Congress intended the question of financial responsibility for a private school placement to be resolved by the administrative and judical review mechanisms set forth in the EHA. Tuition reimbursement is also consistent with the EHA's overriding objective of providing a free and appropriate education for all handicapped children. Where a private school placement has been found to be appropriate, permitting tuition reimbursment ensures that the private placement is free. For a local educational

agency, tuition reimbursement only requires it to reimburse parents monies it would have paid to the private school had it proposed an appropriate placement initially. For parents, tuition reimbursement is often the only practical relief available where a local educational agency has failed to provide an appropriate placement.

The Court of Appeals properly concluded that tuition reimbursement should not be automatically awarded to the prevailing party, but should be available when it is warranted by such equitable considerations as the parties' compliance with state and federal requirements and their conduct and good faith throughout the development of the IEP and later proceedings. These criteria are consistent

with sound equitable principles and with the EHA's purposes and requirements.

II. The second question presented by this case is whether the parents' enrollment of their child in a private school operates as an automatic bar to an otherwise appropriate award of reimbursement. Section 1415(e)(3) states that a child is to remain in his current educational placement until the conclusion of the administrative and judicial proceedings unless his parents and the State or local educational agency otherwise agree.

In this case, it is unnecessary to determine the effect of § 1415(e)(3) on the availability of reimbursement because the parents' actions were not contrary to that provision. Both Burlington and

the parents agreed that Michael's educational placement should be changed. Moreover, the State educational agency, after a full administrative hearing agreed with the parents, not only that Michael's placement should be changed, but that he should be enrolled in the Carroll School.

Even absent an agreement between the parents and the State or local educational agency, § 1415(e)(3) may not be construed to require parents to choose between an education that is free and one that is appropriate. Section 1415(e)(3) governs disputes over interim placements; it does not govern a parent's ultimate right to reimbursement after prevailing on the merits. Interpreting § 1415(e)(3), which was intended to protect parents from unilateral actions by

school officials, to require parents to keep their child in an inappropriate educational placement is contrary to the EHA's requirement of a free appropriate education and the goal of encouraging parental involvement in special education.

To the extent that a parent's actions in enrolling their child in a private school are relevant to an equitable award under § 1415(e)(2), the parents' actions in this case were fully consistent with the EHA's mechanism for resolution of disuptes over a proposed IEP.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED, BASED UPON THE LANGUAGE, HISTORY, AND PURPOSES OF THE EHA, THAT THE DISTRICT COURT HAS THE DISCRETION TO AWARD TUITION REIMBURSEMENT TO THE PARENTS AT THE CONCLUSION OF THE JUDICIAL PROCEEDINGS.

A. An Award of Tuition Reimbursement Comes Within The District Court's Authority To Grant Appropriate Relief.

The Court of Appeals held that the District Court has the authority to award tuition reimbursement to the parents if the Carroll School is found to be the appropriate educational placement for Michael.[22/] The court further held

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22/ Burlington uses the term "damages" to frame the issues and bolster its argument. "Damages" may include, among other things, compensatory or punitive damages,

(footnote continued)

that reimbursement is not automatic; rather, it is based upon equitable considerations. Pet. App. 137a.[23/] It is Burlington's view that the District

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(footnote continued)
neither of which are at issue in this case. See, e.g., Marvin H. v. Austin Independent School District, 714 F.2d 1348, 1354-56 (5th Cir. 1983); Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981); Miener v. State of Missouri, 673 F.2d 969, 979 (8th Cir.), cert. denied, 459 U.S. 909 (1982), see generally Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 42-51 (1981). The only remedy at issue here is tuition reimbursement. To avoid confusion, we therefore follow the Court of Appeals' use of that term, rather than the broader term "damages."

23/ Contrary to petitioners' assertions, Petitioners' Brief at 22, the Court of Appeals did not order that reimbursement be awarded in this case; rather, it remanded the case to the District Court for consideration whether reimbursement

(footnote continued)

Court has no authority whatsoever to award tuition reimbursement to the parents since the EHA does not permit such relief.[24/] This narrow reading of the relief available to parents under the EHA is squarely at odds with the stat-

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(footnote continued)
is appropriate here, in light of the equitable criteria articulated by the Court of Appeals. Pet. App. 124a, 139a.

24/ Burlington apparently believes, nonetheless, that the EHA permits the District Court to order the parents to reimburse Burlington for the tuition it paid during the course of the judicial proceedings. Petitioners' Brief at 52. Certiorari has not been granted on this question. Therefore, the availability of reimbursement to a local educational agency, as opposed to the parents, is not before the Court in this case. To the extent that the issue of reimbursement to a local educational agency is at all pertinent here, the Department concurs in the Court of Appeals' even-handed approach; i.e., that reimbursement may be awarded to the prevailing party in appropriate circumstances, regardless of whether that party is the local educational agency or the parents.

ute's language, history, and purpose.25/

We begin first with the language of the statute which gives the district court jurisdiction to review the final state administrative decision and grant relief. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). The relevant portion of § 1415(e)(2) authorizes the district court to grant "such relief

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25/ Nor is it the prevailing view among the circuits. All of the courts that have considered the issue of reimbursement under the EHA have either held or suggested that, at least under some circumstances, tuition reimbursement is available to parents. See, e.g., Scokin v. State of Texas, 723 F.2d 432, 439 (5th Cir. 1984); Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981); Department of Education v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Smith v. Robinson, 104 S. Ct. 3457, 3473-74 n. 24 (1984).

as the court determines is appropriate." The Court of Appeals has interpreted this provision to permit the district court, in its discretion, to award tuition reimbursement where the facts and circumstances of a particular case warrant such an award. Pet. App. 137a.[26/]

The Court of Appeals' interpretation is entirely consistent with the ordinary meaning of the word "appropriate."[27/] In Hall v. Cole, 412 U.S. 1 (1973), this Court was called upon to interpret the phrase "such relief (including injunc-

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26/ The equitable remedy of reimbursement, unlike the remedy of attorney's fees requiring statutory authorization, see Smith v. Robinson, 104 S. Ct. at 3464, need not be expressly authorized by statute.

27/ See American Tobacco Co. v. Patterson, 456 U.S. at 68 (legislative purpose is expressed by the ordinary meaning of the word used).

tions) as may be appropriate." The Court equated the authority to grant appropriate relief with the authority to "grant relief according to the necessities of the case." Id. at 11 (citations and quotations omitted). Cf. Rowley, 458 U.S. at 198 (the use of the word "appropriate" to describe "education" in the EHA suggests a Congressional intent to assure an educational setting that is suitable to that particular child).[28/] The Court of Appeals' instruction that the district court examine the parties' conduct, consider the circumstances, and balance the equities in each case when considering a request for tuition reimbursement, reflects its understanding

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28/ Webster's Third New International Dictionary 106 (1964) similarly defines "appropriate" as "specially suitable."

that any relief awarded should be "specially suitable" to the individual case.29/

Where, as here, there is no express legislative prohibition of an award of tuition reimbursement to the parents,30/ the common, settled meaning

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29/ More generally, the language "appropriate relief" signifies a grant of equitable jurisdiction. Hall v. Cole, 412 U.S. at 13. Under a court's equitable jurisdiction, reimbursement for monies paid has been considered an available remedy. E.g., Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) (the phrase "other order" allows, as an equitable remedy, an award of reimbursement for monies paid as rent).

30/ Nor is there any Eleventh Amendment bar to tuition reimbursement in this case, since relief is not sought against the state, and any relief awarded would not be paid out of the state treasury. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-02 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977); Hyatt, Litigating the Rights of Handicapped Children

(footnote continued)

of the word "appropriate", i.e., tailored to the necessities of the each case, must govern.[31] Moreover, as shown below, the legislative history fully supports an interpretation that allows the district court the flexibility to award relief suitable to each case, including, where appropriate, tuition reimbursement.

That legislative history first demonstrates that judicial review is the final step in a series of procedural protections afforded to the parents of a handi-

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(footnote continued)
to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 59 (1981).

31/ NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

capped child under § 1415(e) of the EHA. Section 1415(e), as it now appears, was not included in the original House and Senate bills.[32/] Instead, the procedural safeguards, in their present form, were inserted by the Conference Committee as part of an effort to clarify and strengthen the administrative and judicial review provisions of existing law.[33/] S. Conf. Rep. at 48, reprinted in 1975 U.S. Code Cong. & Ad. News at 1501. The Senate Conference Report, com-

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32/ S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 47-50 (S. Conf. Rep.), reprinted in 1975 U.S. Code Cong. & Ad. News 1480, 1500-03.

33/ The Education Amendments of 1974, then in effect, simply provided that whatever administrative hearings were available would be "subject only to appropriate administrative or judicial appeal." Pub. L. No. 93-380, § 612, 88 Stat. 484 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 541, 660.

menting upon the relief available upon judicial review, simply states that the district court is authorized to "grant all appropriate relief." S. Conf. Rep. at 50, reprinted in 1975 U.S. Code Cong. & Ad. News at 1503. By using the word "all" to modify "appropriate relief," the drafters of the EHA evinced an intent to give the court the necessary flexibility to fashion an appropriate remedy. The use of such broad language certainly cannot be construed as a legislative command prohibiting tuition reimbursement.

The strongest evidence, however, of congressional intent to permit tuition reimbursement is found in the Senate Report, which discusses the role of the administrative and judicial proceedings in resolving financial disputes between

parents and a local education agency:

> If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section [1415(e)] appl[y] (emphasis added).

S. Rep. No. 168, 94th Cong., 1st Sess. 32, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1456. It defies logic to contend that Congress intended to require that the administrative and judicial proceedings be used to determine financial responsibility for a private school placement but, at the same time, to prohibit the district court from awarding relief in accordance with a

determination of financial responsibility.[34/]

Moreover, in many cases, a determination of financial responsibility is the only real issue for judicial determination. A decision by the district court that a proposed IEP is appropriate or inappropriate, without more, may often provide hollow relief, since by the time judicial review is completed the school year covered by the IEP in issue will

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34/ This interpretation is further supported by the regulations promulgated by the United States Department of Education implementing the EHA. These regulations incorporate the language of the Senate Report and provide that the "due process procedures" available to parents, which include an administrative hearing and judicial review, will be used to resolve the question of financial responsibility for a private school placement. 34 C.F.R. § 300.403. The construction of the EHA embodied in these regulations is entitled to deference. Irving Independent School District v. Tatro, 104 S. Ct. 3371, 3377 (1984).

ordinarily be over. Reimbursement to the prevailing party may provide the only meaningful remedy for the parents who paid for an appropriate private school placement or for the local educational agency who paid for an inappropriate placement during the interlude of litigation.

The Court of Appeals' construction of the term "appropriate relief" is not only consistent with the language and history of the judicial review provision, it also furthers the goals and purposes underlying the EHA.[35/]

The central purpose of the EHA is to provide an appropriate education to all

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35/ "As in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979); accord Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

handicapped children at no cost to their parents. This goal dominates the statute. The EHA is designed to ensure that all handicapped children are afforded a "free appropriate public education." 20 U.S.C. § 1400(c).[36/] Free appropriate public education means "special education and related services . . . provided at public expense . . . and without charge." 20 U.S.C. § 1401(18)(emphasis added). Special education, in turn, is defined as "specially designed instruction, at no cost to parents." 20 U.S.C. § 1401(16)(emphasis added). See also 34

36/ The term "public education" includes education in private schools at public expense if the public school does not have appropriate special education available. See 20 U.S.C. §§ 1401(18), 1413(a)(4)(B); 34 C.F.R. §§ 300.400-300.452.

C.F.R. § 300.401(a)(2). Thus, the EHA contemplates an education that is both free and appropriate; it does not require parents to choose either a free or an appropriate education. Permitting retroactive reimbursement to parents who have been forced to send their child to a private school due to the failure of the local educational agency to propose an appropriate public school program ensures that the overriding objective of providing education that is both free and appropriate, is met.

To help carry out the goal of making an appropriate education available to the handicapped child at no cost to parents, the EHA provides financial assistance to states and local educational agencies "to relieve the fiscal burden placed [on them] by their responsibility

to provide education for all handicapped children." Smith v. Robinson, 104 S. Ct. at 3468 (citing 20 U.S.C. § 1400(b)(8) and (9)).[37/] The statute does not, however, have the purpose or effect of insulating local educational agencies from the financial burden of providing an appropriate education. Irving Independent School District v. Tatro, 104 S. Ct. at 3377 n. 8.[38/]

37/ Under the EHA, each participating state receives a certain percentage of the average nationwide per-pupil cost of educating a handicapped student multiplied by the number of handicapped students served in that state. Seventy-five percent of these funds (entitlement funds) are passed on to the local educational agencies serving the children. A state may treat the other 25% as discretionary funds. 20 U.S.C. § 1411(c).

38/ Nor, as Burlington apparently concedes, Petitioners' Brief at 23, are local educational agencies protected by the Eleventh Amendment. See n. 30, supra.

If a district court is not authorized to order the local educational agency to pay tuition costs for an appropriate private school placement under any set of circumstances, then "the school system has effectively transferred part of its contractual public obligation to a private party, in contravention of the statute's express primary directive." Brookline School Committee, 722 F.2d at 916.[39/] In contrast, awarding tuition reimbursement to the parents where the private school placement is later found to be appropriate simply imposes on the local school committee the costs it would

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39/ Under state law, it is the local educational agency that is required to bear the primary financial burden of providing an appropriate education for handicapped children. Mass. Gen. Laws Ann., ch. 71B, § 5 (West 1982); 603 C.M.R. 28, ¶¶ 202, 504.5.

have incurred had it made that placement initially. Reimbursement, therefore, only imposes those financial responsibilities contemplated by the EHA.[40/] "[F]or the successful parent to be left with what should have been the town's bill ab initio does not seem a municipal protection that Congress would have intended, however great the shortage of funds." Brookline School Committee, 722 F.2d at 921 (quoting Doe v. Anrig, 561 F. Supp. 121, 127 (D. Mass. 1983), aff'd Doe v. Anrig II, supra).

The availability of court-ordered tuition reimbursement creates an incentive for the local educational agency to

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40/ Cf. Smith v. Robinson, 104 S. Ct. at 3474 (attorney's fees which impose additional financial responsibilities are not authorized under the EHA).

ensure that the initial placement offered to the parents is appropriate, which in turn furthers the legislative goal of providing an appropriate education. It "reflects a sensible accomodation of the [local educational agency]'s interest in shaping the children's educational programs and the children's interest in receiving sufficient educational attention while those programs are being developed." Colin K. v. Schmidt, 715 F. 2d 1, 7-8 (1st Cir. 1984). Without any possibility of reimbursement a child may remain "mired in an inappropriate program while the appellate mechanism[41/] slowly determine[s] his fate," Blomstrom v.

41/ Here, the appellate mechanism began in 1979 and is still not completed.

Massachusetts Department of Education, 532 F. Supp. 707, 713 (D. Mass. 1982), thereby thwarting the express congressional intent.42/

Reimbursement also serves another purpose underlying the EHA, encouraging parental participation in educational decisions. As recognized by this Court, Congress chose to encourage parental involvement in developing educational plans "to assure that appropriate services are provided to a handicapped child."

42/ The Massachusetts Supreme Judicial Court, when addressing the appropriateness of reimbursement as a remedy under Mass. Gen. Laws Ann. ch. 71B, the state special education law, commented that "reimbursement places the parent and child precisely where they would have been had the school committee initially fulfilled its statutory obligation in evaluating the child." Amherst-Pelham Regional School District v. Department of Education, 376 Mass. 480, 493, 381 N.E.2d 922, 931 (1981).

Rowley, 358 U.S. at 208-09 (citing S. Rep. No. 168, 94th Cong., 1st Sess. 11-12, reprinted in 1975 U.S. Code Cong. & Ad. News at 1430); Smith v. Robinson, 104 S. Ct. at 3469. As illustrated by cases like this one, Congress correctly predicted that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." Rowley, supra at 209. The availability of reimbursement permits such parental participation by allowing children the right to receive the education thought to be appropriate by his or her parents, the party normally responsible for such decisions, and encouraging parents "to be assiduous in protecting their child's rights . . . ." Brookline School Committee, 722 F.2d at 921. As a

result, the overall goal of providing an appropriate education is advanced.

In sum, the language, history, and purposes of the EHA demonstrate that Congress intended to allow a district court to order tuition reimbursement where the circumstances of the case warrant such an award. Without the availability of tuition reimbursement as a remedy, the Congressional goal of a free and appropriate education for all handicapped children would be frustrated.

B. The Guidelines Articulated By The Court of Appeals For Determining Whether Reimbursement Is Appropriate Are Consistent With The EHA As Properly Construed.

As stated earlier, the Court of Appeals ruled that retroactive reimbursement may be awarded to the prevailing

party. It is not an automatic remedy, however. Rather, the court cautioned the district court to balance the equities of the case when considering whether to award reimbursement. Pet. App. 137a. The Court of Appeals then articulated equitable factors which might preclude an award of reimbursement to the prevailing party.

Of foremost importance is the requirement that the district court carefully weigh the conduct and good faith of both the parents and the local educational agency throughout the development of the IEP and later proceedings. Pet. App. 133a, 137a, 138a. For example, on remand, the District Court must consider the BSEA's finding that Burlington com-

mitted substantive and procedural violations in the preparation of Michael's IEP. If the District Court finds that those transgressions constitute serious violations of state or federal law,[43] Burlington may be viewed as having acted in bad faith and, therefore, not entitled to reimbursement should it succeed in proving that its proposed IEP was appropriate. Pet. App. 138a. Conversely, if the parents, without justification,

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43/ Unlike Burlington (Petitioners' Brief at 30-31), we do not discuss the particular procedural violations asserted. These are issues yet to be adjudicated by the District Court. We simply note that Burlington's attempt to trivialize them (Petitioners' Brief at 29a) was squarely rejected by the Court of Appeals. "This court declines to rescue the plaintiff from its stance of stubborn indifference to and deprecation of its violations of [Michael's] procedural rights." Pet. App. 147a.

failed to cooperate in the development of the IEP, they may not be entitled to reimbursement, even if they succeed in establishing that the proposed IEP was inappropriate.

Placing this emphasis on the reasonableness of the parties' reciprocal conduct toward one another furthers the goals of the EHA. First, it fosters compliance with the procedural protections afforded under the EHA, so central to the goal of an appropriate education. As this Court stated in Rowley,

> [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard.

458 U.S. at 205-06 (citation omitted). Therefore, a local educational agency's failure to provide the necessary procedural protections is relevant when considering a request for equitable relief under the EHA. Second, in order to meet the goals of the EHA, the parents and the local educational agency must work together year after year to develop the required annual IEPs. Where either party withholds that cooperation, such conduct ought to be relevant to the formulation of appropriate equitable relief.44/

The Court of Appeals also considered the effect of a state agency's decision in the parents' favor on the reviewing

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44/ Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (party seeking back pay under Title VII may not be entitled to relief if its conduct has substantially and improperly prejudiced the other party).

court's determination of whether tuition reimbursement is appropriate. The Court of Appeals concluded that where the State educational agency finds a particular private placement appropriate and orders the child enrolled in that placement, it would simply be inequitable for a reviewing court to hold the parents responsible for funding that placement. The Court of Appeals therefore held that the parents in this case should not be held financially responsible for the tuition expenses incurred for the latter half of the 1979-80 school year, which it referred to as a "safe harbor" period. Pet. App. 136a.[45/] The Court of

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45/ Although the court did not expressly hold that the parents are entitled to reimbursement for the safe harbor period, it implied as much by holding that Burlington is not entitled to be reimbursed for any tuition paid by it during that

(footnote continued)

Appeals further recognized that by enforcing the state hearing officer's reimbursement order,[46] the court would be furthering the EHA's scheme of cooperative federalism elaborated in Rowley[47] by assisting the State educational agency

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(footnote continued)
period. In fact, Burlington paid no tuition for that period; therefore, if the parents are to be free of financial responsibility for that period, such a result could be accomplished only by requiring Burlington to reimburse them.

46/ The hearing officer in this case ordered Burlington to reimburse the parents for the 1979-80 school year. As recognized by the Court of Appeals, Massachusetts hearing officers have the authority under state law to order such tuition reimbursement. Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. at 492-93, 381 N.E.2d at 930-31 (1978); 603 C.M.R. 28, ¶ 504.5(f). However, whether a federal court has such authority under state law is immaterial to the single federal question presented by this case. See also n. 48, infra.

47/ Rowley, 458 U.S. at 207-09.

in its own enforcement efforts.[48/]

Finally, the Court of Appeals discussed the role of § 1415(e)(3) as it bears upon an equitable award of reimbursement. As we demonstrate in the

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48/ A different situation would be presented where, unlike here, a federal court attempted to enforce state law against a state. Such relief would be barred by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 911 (1984); Smith v. Robinson, 104 S. Ct. at 3464 n. 6; Ezratty v. Puerto Rico, 648 F.2d 770, 776-77 (1st Cir. 1981); Max M. v. Thompson, 585 F. Supp. 317, 332 n. 7 (N.D. Ill. 1984). Since, in this case no party alleges a violation of state law on the part of state officials and no relief is sought against the state, such Eleventh Amendment concerns are not presented. See Students of California School for the Blind v. Honig, 745 F.2d 582, 583-87 (9th Cir. 1984)(dissent from denial of rehearing en banc), petition for cert. filed, 53 U.S.L.W. 3243 (U.S. Sept. 17, 1984) (No. 84-436); St. Louis Developmental Disabilities Treatment Center Parents Association v. Mallory, 591 F. Supp. 1416, 1477 n. 95 (W.D. Mo. 1984); William S. v. Gill, 591 F. Supp. 422, 426 n. 7 (N.D. Ill. 1984).

following section, the Court of Appeals correctly concluded that § 1415(e)(3) does not govern the parents' ultimate right to seek relief under § 1415(e)(2). In sum, the criteria articulated by the Court of Appeals for determining whether tuition reimbursement would be appropriate relief is consistent with the EHA generally and, more particularly, with § 1415(e)(2).

II. THE PARENTS' ENROLLMENT OF THEIR HANDICAPPED CHILD IN AN APPROPRIATE PRIVATE SCHOOL, PENDING ADMINISTRATIVE AND JUDICIAL REVIEW, DOES NOT OPERATE AS A BAR TO REIMBURSEMENT UNDER § 1415(e)(2).

Burlington contends that even if the District Court is authorized to award tuition reimbursement under § 1415(e)(2), the parents have forfeited any right to

reimbursement by enrolling Michael in the Carroll School in September 1979. As support for this proposition, Burlington claims that the parents have "violated" § 1415(e)(3), the "interim placement" provision, and that a violation of § 1415(e)(3) automatically precludes tuition reimbursement. Petitioners' Brief at 37-44. The Court of Appeals rejected both arguments. The court's interpretation of § 1415(e)(3) generally and as applied to this case is correct.

A. By Placing Their Child In Private School Pending Appeal, The Parents Did Not Violate the Provisions of 20 U.S.C. § 1415(e)(3).

Once again we begin with the language of § 1415(e)(3), which is within that section of the EHA that sets forth the

procedural safeguards for parents of handicapped children. The provision provides in relevant part:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, . . . until all such proceedings have been completed.

Thus, absent agreement between the parents and the State or local educational agency, the child is to remain in his "current educational placement" until the conclusion of the administrative and judicial proceedings.

In this case, however, there was an agreement between the parents and Burlington that Michael should not remain in his "current educational placement." Although the parents and Burlington have disagreed on the appropriate special

education program for Michael, they did agree on one thing in the spring of 1979: Michael's regular class at the Memorial School was not adequate to meet his special education needs and his placement should be changed. J.A. 203-06, 316-18; Pet. App. 13a. Therefore, since Burlington and the parents "otherwise agree[d]" that Michael's "then current educational placement" would be changed, his change in placement did not violate § 1415(e)(3).[49/]

Not only did Burlington and the par-

49/ See, e.g., Zvi D. v. Ambach, 694 F.2d 904, 906 n. 4 (2d Cir. 1982) (the educational agency and the parent may agree to a change in placement); Monahan v. Nebraska, 491 F. Supp. 1074, 1089 (D. Neb. 1980), aff'd in part, vacated in part, 645 F.2d 592 (8th Cir. 1981) ("child had no 'then current educational placement' because all parties agreed the child could not remain in his previous educational setting").

ents agree that Michael should not remain in his "then current educational placement," but the State educational agency, acting through the BSEA, agreed with Michael's parents that Burlington's proposed IEP was inadequate and that he ought to be educated in the special education program offered by the Carroll School.[50/] Thus, even if there was no agreement with Burlington that Michael change placements, the use of the disjunctive "or" in the language of § 1415(e)(3) ("State or local educational agency") indicates that the statute allows a change in placement where the State, rather than the local educational

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50/ The Court of Appeals did not address whether there was an agreement between the State and the parents because it found that both Burlington and the parents agreed that Michael should not remain at the Memorial School. Pet. App. 132a.

agency, agrees with the parents on the child's placement.[51] In this case, after a lengthy hearing, the BSEA issued a decision which upheld the parents' position, i.e., that Michael belonged in the Carroll School for the 1979-80 school year. Accordingly, for purposes of § 1415(e)(3), the State and the parents have "otherwise agree[d]" that the appropriate placement for Michael's special education needs was at the Carroll School.

This interpretation of § 1415(e)(3) is also consistent with the purposes of the EHA. Indeed, it is difficult to

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51/ See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.").

imagine what congressional purpose could be served by interposing the wishes of the local educational agency when the State educational agency and the parents have agreed on the appropriate special education program for the student. Where Congress has placed primary responsibility upon the State educational agency for insuring that each handicapped child receives a free and appropriate special education, the determination of that agency ought to be implemented when it is reached in accordance with the procedural guarantees provided to parents under § 1415(e)(3). Since the Department and the parents agreed to Michael's placement at the Carroll School pending the resolution of Burlington's judicial appeal, no violation of § 1415(e)(3)

occurred here.

In order to avoid the obvious conclusion that § 1415(e)(3) has no applicability to this case and ignoring the plain meaning of the word "current", Burlington asserts that its proposed IEP, which called for a change to a separate special education class at the Pine Glen School, should be treated as the "then current educational placement" for purposes of § 1415(e)(3). Petitioners' Brief at 42. Burlington then claims that because there was no agreement to move Michael from this proposed placement, Michael's parents violated § 1415(e)(3) by enrolling him in the Carroll School. Yet Burlington's view that its proposed IEP was Michael's "current educational placement" defies common sense. As an initial matter, since Michael's parents

never accepted the proposed IEP, that IEP never went into effect and special education services could not have been provided.[52/] The most significant point, however, is that Michael never attended the Pine Glen School. Burlington's view of Michael's current educational placement is therefore inconsistent with the purpose of the provision, which is to ensure continuity in a child's education by preserving the status quo.[53/] Thus, since Michael has

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52/ Special education services will not be provided until an IEP is "in effect." 34 C.F.R. § 300.342. An IEP is not "in effect" unless and until it is regarded "by both the parents and the agency as appropriate." 34 C.F.R. Part 300, Appendix C, Notice of Interpretation, Q. 3.

53/ "Because of its belief that erroneous classifications [of handicapped children] were widespread, Congress determined that the interests of the handicapped child would be best served by

(footnote continued)

never attended the school proposed by the IEP, preservation of the status quo is not an issue. Accordingly, where all parties agreed that Michael should not remain at the Memorial School, his enrollment in the Carroll School did not contravene § 1415(e)(3).

B. Section 1415(e)(3) Does Not Govern The Availability Of Reimbursement.

Even if the private placement here could be viewed as contrary to the provisions of § 1415(e)(3), Burlington's view

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(footnote continued)
imposing the status quo upon placement pending the resolution of any parental complaints prompted by a proposed change in placement." Tilton v. Jefferson County Board of Education, 705 F.2d 800, 804 (6th Cir. 1983), cert. denied, 104 S. Ct. 998 (1984); see also Brookline School Committee, 722 F.2d at 918 (§ 1415(e)(3) "establishes a strong preference, but not a statutory duty, for maintenance of the status quo.").

of the effect of § 1415(e)(3) on the availability of relief under § 1415(e)(2) is not supported by the language, history, or purposes of § 1415(e)(3).

For purposes of Burlington's claim, § 1415(e)(3) is more notable for what it does not say. First, it says nothing regarding the consequences of parents' enrolling their child in a private school. Second, there is no mention of payment or reimbursement. Finally, the provision does not address the parents' right to relief at the conclusion of the judicial review proceedings. Thus, the language of § 1415(e)(3) fails to provide any support for Burlington's claim that the parents' enrollment of Michael in the Carroll School, while they were pursuing their administrative and judicial

remedies, constitutes an absolute bar to their ultimate right to reimbursement under § 1415(e)(2).

The history and purpose of § 1415(e)(3) demonstrates that it was intended as a protection for children against unilateral actions by school officials who had previously assigned or reassigned handicapped children to educational programs or, indeed, removed students from school without notifying parents or according them an opportunity to challenge that reassignment or removal.

Section 1415(e)(3) did not appear in any form in either the original House or Senate bills; it was added by the Conference Committee.[54/] The interim placement language inserted by the Conference

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54/ S. Conf. Rep. at 50, reprinted in 1975 U.S. Code Cong. & Ad. News at 1503.

Committee originated in two 1972 district court decisions "which, to a significant extent, guided the drafters of the Act." Rowley, 458 U.S. at 194.[55/] The Mills and PARC cases arose primarily because handicapped children were often excluded entirely, expelled, suspended, or reassigned from regular classes without notice and an opportunity to be heard. Mills, 348 F. Supp. at 868; PARC, 343 F. Supp. at 282. In both cases the district court established, in addition to the substantive right to an appropriate education, extensive notice and hearing rights for parents of handicapped chil-

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55/ Pennsylvania Association for Retarded Children v. Pennsylvania (PARC), 343 F. Supp. 279 (E.D.Pa. 1972); Mills v. Board of Education (Mills), 348 F. Supp. 866 (D.D.C. 1972).

dren prior to a change of placement. Included within the procedural protections afforded to parents was the requirement that, except in extraordinary circumstances, there shall be no change in the child's regular educational placement until the completion of the hearing procedures.[56/]

By incorporating the parents' procedural rights set out in PARC and Mills, including the child's right to remain in the existing placement, into the EHA's

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56/ Mills provides, for example:

> Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the Superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. 348 F. Supp. at 882.

section providing safeguards for parents, Congress made clear that it intended § 1415(e)(3) to operate as a protection for handicapped children and their parents against adverse action by public school officials. The United States Department of Education has accordingly interpreted § 1415(e)(3) to bar interim changes in placement actions by the educational agency. 34 C.F.R. Part 300, Appendix C, Notice of Interpretation, Q. 35. This administrative interpretation is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1965); United States v. Larionoff, 431 U.S. 864, 872 (1977).[57/] To interpret this

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57/ See also Tokarcik v. Forest Hills School District, 665 F.2d 443, 453 (3rd Cir. 1981), cert. denied, 458 U.S. 1121 (1982) ("the 'stay put' provision insures that a school cannot eject a child without complying with due process require-

(footnote continued)

section, which was intended to protect parents and children from precipitous actions by local educational agencies, as a bar to equitable relief to parents is directly contrary to Congress' intent.

The only floor discussion pertinent to § 1415(e)(3) stresses the flexible nature of the provision as a means of avoiding unnecessary delays in placements:

> The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child are completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the state.

(footnote continued)
ments"); Cox v. Brown, 498 F. Supp. 823, 827 (D.D.C. 1980)("Section 1415(e)(3) is part of the due process section of the EHA granting a panoply of rights to children and their parents").

121 Cong. Rec. 37,412 (1975) (remarks of Sen. Stafford). The importance to a handicapped child's development of avoiding unnecessary delays and insuring prompt implementation of appropriate placements appears throughout the legislative history. As one sponsor of the EHA stated:

> In addition, I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development.

121 Cong. Rec. 37,416 (1975)(remarks of Sen. Williams).

The availability of tuition reimbursement facilitates prompt implementation of appropriate placements. On the one hand, local educational agencies have a greater incentive to propose appropri-

ate placements initially if they are held financially responsible for the appropriate placement. On the other hand, the potential for reimbursement from the local educational agency encourages parents to be assiduous in protecting their child's rights. Brookline School Committee, 722 F.2d at 920-21.[58/]

Burlington's position that § 1415(e)(3) requires parents to keep their child in an arguably inappropriate placement or later forfeit reimbursement is inconsistent with the statute's goal of providing handicapped children with a free and appropriate education. In this case, for example, if the parents had

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58/ The Court of Appeals also recognized that the possibility of having to repay the local educational agency for a change to private school would militate against impulsive or unfounded actions on the part of the parents. Id.

not placed Michael in the Carroll School pending appeal, he would have had to remain in either the Memorial School (his last educational placement) or the Pine Glen School (Burlington's proposed educational placement) from the fourth grade (1979-80) at least through the ninth grade (1984-85) and possibly longer depending upon when the judicial proceedings in this case are completed. Assuming that on remand the District Court determines that Michael's appropriate educational placement is at a private school specializing in learning disabilities, Michael would have spent at least six years in an inappropriate educational setting if his parents had not placed him in a private school. As the Court of Appeals recognized, interpreting § 1415(e)(3) as requiring a handicapped

child to remain in an arguably inappropriate placement "treats these special needs students as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings." Pet. App. 130a. The drafters of the EHA, who hailed the statute as a giant step forward in their efforts to meet the needs of approximately eight million handicapped children,[59] could not possibly have intended such a result.[60]

Rather than leave their child in what they believed to be an inappropriate

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59/ See 121 Cong. Rec. 37,410 (1975).

60/ Interpretation of the language of § 1415(e)(3) as mandatory, rather than directory, is not only inconsistent with the purposes of the EHA, it would result in an interference with a parent's right to make educational choices for his or her child. Anderson, 658 F.2d at 1209.

placement, the parents chose to enroll him in a private school. If it is determined on remand that the private school placement was the appropriate choice, a rule barring tuition reimbursement would mean that Michael will have received an education that was appropriate, but not free. Such a result would also be contrary to Congressional intent.

Although, for the reasons just discussed, § 1415(e)(3) cannot properly be construed as an absolute bar to tuition reimbursement, in some cases the parents' unilateral removal of their child from public school may be relevant to their right to equitable relief under § 1415(e)(2). However, this is not such a case. The parents have neither failed to cooperate in the development of the

IEP nor ignored the administrative procedures set forth in the EHA.[61/] Here, the parents cooperated with school officials for over three years in an effort to secure appropriate educational placements for Michael. J.A. 50-85. Only after they were advised repeatedly by a pediatric neurologist that their child had a severe learning disability, and needed immediate specialized attention not available in the public school, did

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61/ Burlington relies on Stemple v. Board of Education, 623 F.2d 893 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981), which held that parents who unilaterally place their child in a private school cannot recover the tuition costs thus incurred. Id. at 897. Cf. also Stacey G. v. Pasadena Independent School District, 695 F.2d 949, 951-52 (5th Cir. 1983). In Stemple and Stacey G., unlike here, the parents did not claim an administrative appeal until their child had been in a private placement for a year or more. Moreover, in Stemple, unlike here, the State found the public, not the private, school to be the appropriate educational placement.

they exercise their right to reject Burlington's proposed IEP and initiate the due process procedures set forth in § 1415. J.A. 26, 30, 31. Furthermore, prior to the administrative hearing the parents participated in mediation sessions conducted by the BSEA seeking to resolve the dispute over Michael's appropriate placement. J.A. 32-34. Finally, they timely pursued their administrative appeal which resulted in a determination by the Department that Michael required the special education program provided by the Carroll School. Pet. App. 1a-27a. Thus, the EHA's requirement that parents utilize the due process procedures created by the statute as the mechanism for resolving disputes concerning appropriate

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education have been met. There is therefore no equitable ground for denying reimbursement as "appropriate relief" under § 1415(e)(2) because of the parents' enrollment of Michael in the Carroll School.

In sum, the parents' enrollment of their child in a private school was not contrary to the "interim placement" provision since the parents, Burlington, and the Department agreed that Michael should not remain in his "then current educational placement." Even if there was no agreement, however, that provision does not bar an award of equitable relief under § 1415(e)(2).

CONCLUSION

For the foregoing reasons, the Respondent Department of Education requests this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

20 U.S.C. § 1401. Definitions

As used in this chapter-

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * * *

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which dis-

order may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home

instruction, and instruction in hospitals and institutions.

* * * *

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in

any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and

evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1415. Procedural safeguards

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

* * * *

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decisions made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a

civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain

in the then current educational placement of such child, or, if applying for initial admission to a public school, shall with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

34 C.F.R. § 300.403 Placement of children by parents

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's

education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.514 of Subpart E.

603 Code of Massachusetts Regulations 28

¶ 504.5(f) If a child's parent enrolled the child in a Division-approved private day school or residential school program and appealed the child's IEP to the Bureau of Special Education Appeals or the SAC under Chapter 4, and the

Bureau of Special Education Appeals or the SAC determines that the IEP developed by the school committee is inadequate and the parent's choice of placement is appropriate, the school committee shall pay the full cost of instruction and support actually rendered or furnished to such child by the private school, retroactive to the date the inadequate IEP was rejected by the parent or could reasonably have been expected by the parent. The school committee shall enter into an agreement or contract with the private school, and shall report to the appropriate Regional Branch Office of the Division that the placement has been made.